

## ISSUES

The original Award was entered in this case on November 23, 1992. Claimant sustained a low-back injury while working for the respondent on April 30, 1990. After two back surgeries, claimant was awarded a 66 percent permanent partial general disability based on a work disability consisting of a 72 percent loss of ability to perform work in the open labor market and a 60 percent loss of ability to earn a comparable wage.

On April 10, 1996, the respondent filed a Petition for Review and Modification of the November 23, 1992, Award. The Administrative Law Judge found respondent had proved that claimant's condition had improved resulting in a decrease in claimant's work disability. The Administrative Law Judge found claimant's current loss of ability to perform work in the open labor market was 15 percent and his current loss of ability to earn a comparable wage was 27 percent. The Administrative Law Judge averaged those two work disability factors and found claimant's work disability had been reduced from 66 percent to 21 percent.

K.S.A. 1989 Supp. 44-528(d) provides that any modification of an award on the basis that the work disability has either increased or diminished shall be effective as of the date the increase or diminishment actually occurred, but in no event shall the effective date be more than six months before the date the application for review and modification was filed.

The Administrative Law Judge found the effective date for modification of the Award from a 66 percent work disability to a 21 percent work disability should be December 16, 1996. This is the date respondent's vocational expert reported his opinion as to the change in claimant's ability to perform work in the open labor market and to earn a comparable wage.

The only issue raised by the respondent on appeal for Appeals Board review is the effective date of the modification of the Award.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

The Appeals Board finds the effective date of the modification of the Award should be October 10, 1995. The respondent filed its Petition for Review and Modification on April 10, 1996. K.S.A. 1989 Supp. 44-528(d) provides that the effective date of any modification shall be the date the increase or diminishment actually occurred, but in no event more than six months before the date the application was filed.

In this case, the Appeals Board finds the record supports the conclusion that claimant's work disability had decreased at least as early as January 1995. Orthopedic surgeon Randall L. Hendricks, M.D., examined claimant on July 8, 1996, and opined that

claimant's condition was drastically better than his condition was in 1991. He further stated that claimant had been in that condition at least one year before his July 8, 1996, examination. Claimant testified he was operating a mobile home parts, repair, and moving business in 1995. Claimant's 1995 federal tax return with attached Schedule C was admitted into evidence and showed a taxable income for 1995 of \$19,229 for a weekly average of \$369.79.

As previously noted, respondent did not file its Petition for Review and Modification until April 10, 1996. Although the record proves claimant's work disability was decreased at least as early as January 1995, an award cannot be modified more than six months before the filing of the application. Accordingly, the Appeals Board finds October 10, 1995, is the correct effective date for the modification of the Award.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the January 15, 1998, Review and Modification of an Award entered by Administrative Law Judge Nelsonna Potts Barnes should be, and is hereby, modified to change the effective date of the modification of the Award from December 16, 1996, to October 10, 1995.

The Appeals Board adopts all remaining orders contained in the Award that are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1998.

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BOARD MEMBER

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c: Carlton W. Kennard, Pittsburg, KS  
John I. O'Connor, Pittsburg, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director